LEE CHONG SANG

v.

FONG YUCK & ANOR

HIGH COURT SABAH & SARAWAK, SANDAKAN
RICHARD MALANJUM J
[CIVIL SUIT NO: S 79 OF 1989]
18 SEPTEMBER 1997

CONTRACT: *Agreement - Arrangement in respect of motor vehicle - Trust deed - Breach - Damages - Actual loss suffered*

EVIDENCE: *Burden of proof - Allegation of signature on trust deed - Evidence Act 1950, s. 103 - Whether document becomes admissible by reason of marking as exhibits*

The present action was a claim by the plaintiff against the defendants jointly and severally for a sum of RM120,000 together with costs and interest in respect of a motor vehicle model Mercedes Benz 280E ('the said vehicle') or alternatively for a declaration that the plaintiff was the rightful owner of the said vehicle.

The plaintiff claimed that he was originally the registered owner of the said vehicle. He was facing financial difficulties and had entered into an arrangement with the 1st defendant whereby the plaintiff transferred the ownership of the said vehicle to the 1st defendant for the purpose only of securing a loan from Sabah Finance Bhd which the 1st defendant had agreed to arrange to assist the plaintiff out of his financial difficulties. However, the repayment of the monthly instalments for the loan was made by the plaintiff. A Trust Deed was purportedly executed by the plaintiff and the 1st defendant as evidence of the above arrangement.

The plaintiff claimed that subsequently the defendant had forcefully taken the said vehicle away from him and inspite of the plaintiff's reference to the Trust Deed and their arrangement, the 1st defendant had refused to return the said vehicle to the plaintiff. In fact, the ownership of the said vehicle was subsequently transferred by the 1st defendant to his wife, the 2nd defendant, and a loan was arranged for the 2nd defendant on the security of the said vehicle with the 1st defendant as the guarantor.

The defendants, however, contended that the plaintiff had sold the said vehicle to the 1st defendant and the purchase price was settled by way of a loan from Sabah Finance Bhd and the balance by way of a set-off on the debts owing by the plaintiff to the 1st defendant. After the sale, the plaintiff was allowed to continue using the said vehicle on rent from the 1st defendant just to maintain his image and status provided the plaintiff paid the monthly instalment, taxes, insurance and other expenses incurred in respect of the said vehicle. However, the 1st defendant decided to take back the said vehicle from the plaintiff when he learned about the financial difficulties faced by the plaintiff. According to the 1st defendant, the plaintiff had voluntarily surrendered the said vehicle to him together with the keys to the said vehicle. The 1st defendant also denied that there was a Trust Deed between him and the plaintiff in respect of the said vehicle.

The issues before the court were: a) whether there was indeed a sale of the said vehicle from the plaintiff to the 1st defendant; or b) whether there was simply an arrangement between the parties to be inferred or evident in the Trust Deed between the parties to enable a loan to be obtained from Sabah Finance Bhd and c) if the answer to (a) above was in the negative and to (b) above was in the affirmative, whether the plaintiff had proven any loss and damage suffered.

Held:

[1] The plaintiff had to do more than just asserting that the signature on the Trust Deed belonged to the 1st defendant. Only the witness to the signature of the plaintiff on the Trust Deed was called, whereas the witness to the alleged signature of the 1st defendant was not called. The onus is upon the plaintiff to prove his assertion.

[2] The marking of the Trust Deed as an exhibit should not be taken as conclusive as regards the alleged signature of the 1st defendant. A document does not become admissible in evidence merely because it has been handed to the adjudicating officer and marked as exhibit.

[3] On the evidence adduced, the court was not satisfied on the balance of probabilities that the plaintiff had proven his assertion that the alleged signature on the Trust Deed belonged to the 1st defendant. Instead, there were too many uncertainties attached to the Trust Deed. Hence, the court denied the plaintiff the benefit of the Trust Deed.

[4] On the finding of facts, the version of the plaintiff as regards an agreement or arrangement with the 1st defendant was more probable than that of the 1st defendant's assertion of a sale. On the balance of probabilities the plaintiff had established his version.

[5] The plaintiff had suffered actual loss as the said vehicle was gone. This loss was a direct result of the breach of the agreement or arrangement on the part of the 1st defendant. The value of the actual loss was indicated by reference to the cash price given by MBF Finance Berhad for the said vehicle when the 1st defendant took a loan from them.

[Judgment for the plaintiff.]

Case referred to:
Chong Khee Sang v. Pang Ah Chee [1984] 1 MLJ 377 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 11
Evidence Act 1950, s. 103

For the plaintiff - Lee Chong Sang
For the defendant - Edwin Tsen; M/s Tan Pang Tsen & Co

Reported by Ling Hea Hoon

JUDGMENT

Richard Malanjum J:

The Claim

This is an action by the plaintiff against the defendants jointly and severally for the following relief (verbatim):

(a) The said sum of RM120,000;

(b) Statutory interest of 8% per annum on the said sum from the such period as the court thinks fit until full payment;

(c) Alternatively, a Declaration Order (sic) to the effect that the plaintiff is the rightful owner of the vehicle;

(d) Any other just relief;

(e) Costs.

The claim is based on the following, namely, on a document purported to be a Trust Deed dated 6 August 1989 ("Trust Deed") and/or an agreement to be inferred from the conduct of the plaintiff and the 1st defendant. And the subject matter of the claim is a motor vehicle model Mercedes Benz 280E bearing the registration number L6 ("the said vehicle").

The defendants are resisting the claim contending in their amended statement of defence the following, in summary:

(i) that the said vehicle was sold to the 1st defendant for the sum of RM55,000 which was settled by way of a loan in the sum of RM35,000 from Sabah Finance Bhd. and the balance by way of a set-off on the debts owing to the companies of the 1st defendant by the plaintiff's company, Sun Ho Sdn. Bhd.

(ii) that the plaintiff was allowed to continue using the said vehicle after the sale as the 1st defendant agreed to assist the plaintiff to maintain his image and status in times when he was in financial difficulties, provided the plaintiff paid the monthly instalments with Sabah Finance Bhd., the taxes, insurances and other expenses incurred. And that after the completion of repayment to Sabah Finance Bhd. the plaintiff was to return the said vehicle to the 1st defendant without any condition;

(iii) that the 1st defendant never executed the purported trust deed;

(iv) that even after the completion of the repayment to Sabah Finance Bhd. the plaintiff requested for further use of the said vehicle. The 1st defendant agreed subject to payment of interest at the rate of 8% per annum on the debts owing to his companies by the plaintiff's company;

(v) that on 5 October 1989 the plaintiff voluntarily delivered the said vehicle to the 1st defendant; and

(vi) that the 1st defendant was compelled to take legal action against the plaintiff and his company due to the pending application by the Inland Revenue Department to wind up the plaintiff's company which was unable to pay its debts.

The plaintiff appeared in person after his counsel had discharged himself. And I was not prepared to give further adjournment as sufficient time had been given earlier to prepare for the hearing.

Further, at the end of the plaintiff's case, learned counsel for the defendants submitted that there was no case to answer. However, after considering the evidence adduced at that stage I concluded to the contrary. In my view, as it was a question of credibility of witnesses involved I should only determine it after hearing the version of the defendants. Otherwise at that stage there

would have been only one version which I did not find to be inherently incredible or improbable. Further, the surrounding circumstances as a whole should also be taken into account in determining the case.

The Issues

Having heard the evidence adduced, both oral and documentary and having considered the respective final submissions of the plaintiff and the learned counsel for the defendants it is my view that this action should be determined by considering the following issues:

(1) was there a sale of the said vehicle?

or

(2) only an arrangement or agreement to be inferred or evident in the Trust Deed between the plaintiff and the 1st defendant to enable a loan to be obtained from the Sabah Finance Bhd.; and

(3) If the answer for Issue (1) is in the negative and for Issue (2) in the affirmative, whether the plaintiff has proved any loss and damage suffered.

(a) Issues (1) and (2)

As I find these two Issues to be inter-related they should therefore be considered together. Basically, it is a matter of deciding which version is more probable and acceptable. At the same time it is also necessary to determine the admissibility or the probable value or weight to be given to the Trust Deed.

(i) The Plaintiff's Version

It is the plaintiff's case that he was once the registered owner of the said vehicle. From the evidence of the plaintiff he said that he used the said vehicle for more than 20 years. Unfortunately he had some financial difficulties. The 1st defendant offered his assistance by arranging a loan for the plaintiff in return for a 10% of the loan obtained as commission. A loan was therefore arranged with Sabah Finance Bhd. for the sum of RM35,000. But the ownership of the said vehicle had to be transferred to the 1st defendant. Obviously, the borrower on record had to be the 1st defendant. The plaintiff further testified that he only took RM35,000 although the said vehicle was valued much more as he did not want to lose it. As regards the repayment of the loan the plaintiff said that he paid the monthly instalments. He also paid the road taxes. He even took care of the repair costs. At the same time he continued using the said vehicle. The plaintiff also said that he did pay the 1st defendant the RM3,500 as agreed.

To show that the transfer of the ownership of the said vehicle to the 1st defendant's name was only for the purpose of securing the loan, the plaintiff produced the Trust Deed. He claimed that the 1st defendant signed it.

And the plaintiff went on to say that on 5 October 1989 he was stopped by a person unknown to him in front of the Shangri-La Hotel in Kota Kinabalu. He was forced out of the said vehicle and that person drove away with it. At that time he did not know what happened. He lodged a police report on the incident. Later on he discovered that the 1st defendant had the said vehicle. He asked for the return but the 1st defendant refused. And the plaintiff said that inspite of his reference to the Trust Deed and their verbal agreement the 1st defendant still refused.

Under cross-examination the plaintiff said that he could not remember if his company had contracts with the two companies of the 1st defendant. He further denied signing certain documents shown to him. And the plaintiff disagreed to the suggestion that as he had debts with the 1st defendant's companies he therefore sold the said vehicle. But he acknowledged that legal actions had been commenced to recover the sum of RM135,000 from him and his company. According to the plaintiff, although there was a proceeding taken by the Inland Revenue Department against his company in 1985 it was not wound-up.

The plaintiff denied that he was allowed to use the said vehicle after the sale to enable him to keep up with his image and status. And when it was put to him that he paid for the loan repayment instalments in return for the use of the said vehicle, the plaintiff replied that it was not true. The plaintiff added that the Sabah Finance Bhd. knew that the said vehicle was his as he was called whenever there was a delay in the repayment.

In answer to a question as to why he did not ask for the retransfer upon settlement of the loan, the plaintiff said that he did. And when asked if he would have taken legal action to have the said vehicle re-transferred, the plaintiff only said that he did not expect someone would come and grabbed it from him.

As regards the Trust Deed, the plaintiff denied that it was made only after the said vehicle was taken away from him.

Learned counsel for the defendants also put to the plaintiff that he voluntarily surrendered the said vehicle to the 1st defendant on 5 October 1989 together with the two keys. The plaintiff disagreed. According to the plaintiff the 1st defendant was not even present at that time. But he did not know how the 1st defendant secured the second key as he only used one key at the time the said vehicle was taken.

The plaintiff was then asked about his reporting of the incident to the police. He was not sure exactly when he reported it but he said it was soon after. He said that he was in shock after the said vehicle was seized from him. When asked why he did not mention the Trust Deed in his police report, the plaintiff explained that the police was not interested in such a document.

The plaintiff also said that after a while he came to know that the said vehicle was transferred to the 2nd defendant, the wife of the 1st defendant.

Next, the plaintiff called Mr. Jooskin bin Toripon (PW2). Basically this witness testified that he was present when the Trust Deed was executed by the plaintiff and one Mr. Fong. However, he only witnessed the signature of the plaintiff whilst the signature of Mr. Fong was witnessed by one Mr. Alexson. According to PW2 there were four of them in the room at that time including Mr. Fong. But as it was a long time ago he said that he could no longer recognise Mr. Fong. That was the first time he met Mr. Fong. And in fact he did not know him.

When cross-examined, PW2 said that he went to the plaintiff's office in August 1986. He agreed to witness the signature as he knew the plaintiff very well. After witnessing the signature he left the room.

(ii) Defendants' Version

The 1st defendant (DW1) gave evidence. He said that he knew the plaintiff since 1975. He had done sub-contract works for the plaintiff's company supplying sand, stones and equipment. He also did sub-contract work on a sewage project. He used two companies to do the jobs. He stopped doing sub-contract for the plaintiff's company in 1983 as the works were completed. However not all payments were paid. As such he had commenced legal actions against the plaintiff and his company.

The 1st defendant tendered two writs of summons marked "exh. D2" and "exh. D4" respectively. According to him they are yet to be heard. The 1st defendant justified in taking the legal actions by referring to an advertisement in the newspaper which he read in 1989 regarding an action taken by the Inland Revenue Department against the plaintiff's company and the plaintiff himself.

According to the 1st defendant when he first read the advertisement he approached the plaintiff for repayment. However, the plaintiff told him that he could not pay. That was in October 1989. The 1st defendant also said that he was afraid that the matter would affect the said vehicle which he rented to the plaintiff. As a result the 1st defendant informed the plaintiff that he had to take back the said vehicle as it might be affected. And although the

plaintiff told the 1st defendant that he had no car to use, the 1st defendant said that he nevertheless surrendered it to him on that day together with two keys. He took the said vehicle and arranged for it to be transported to Sandakan. Such was the account of the 1st defendant on an incident which the plaintiff on the other hand described as grabbing.

As to how the sale of the said vehicle came about, this was the version of the 1st defendant. One night, a long time ago, around 1986 the plaintiff called him. They used to be good friends. The plaintiff told him that he needed RM35,000 urgently. And he was willing to transfer the ownership of the said vehicle to the 1st defendant. However, he told the plaintiff that he had no money and in fact the plaintiff owed him a lot of money. Hence, the plaintiff proposed to sell the said vehicle to him for RM55,000. According to the 1st defendant that was the valuation of the plaintiff himself. And the 1st defendant further said that the plaintiff agreed that the sum of RM20,000 would be deducted for the debts. The 1st defendant considered the offer was good. He could get his money and also he could sell the said vehicle to pay off his own debts. That resulted in the 1st defendant taking a loan with Sabah Finance Bhd. for the sum of RM35,000 which the plaintiff took.

After the sale, the 1st defendant said that the said vehicle was used by the plaintiff. He considered it as rented to the plaintiff. The plaintiff was responsible to pay for the loan instalments, parking fees, insurance and road tax. And other expenses too in the event of an accident. According to the 1st defendant he only had a verbal agreement with the plaintiff as they were good friends.

As for the balance of the debts the 1st defendant said that there was no payment after the sale of the said vehicle.

In respect of exh. P1 (Trust Deed) the 1st defendant said that he had no recollection ever signing such a document. He denied that the signature found therein was his. He said that he did not know any person by the name of Mr. Alexson. The first time he came to know of the existence of such a document was when he was shown a photocopy of it in his solicitor's office. That resulted in him lodging a police report. According to the 1st defendant his name was wrongly spelt in exh. P1 and that his identity card number was also wrong.

As to what happened to the said vehicle, the 1st defendant said that he had sold it off. He denied ever holding it on trust for the plaintiff.

When cross-examined by the plaintiff, DW1 again denied ever signing exh. P1. He also disputed the suggestion of the plaintiff regarding the loan with Sabah Finance Bhd. and the commission of RM3,500 allegedly paid to him. DW1 in fact said that as the plaintiff was the former owner of the said vehicle the loan was therefore paid to him. And when it was put to him that the plaintiff did tell him that he was to re-transfer the ownership to the plaintiff upon full payment of the loan, DW1 replied that he did not hear such a statement being made.

As regards the value of the said vehicle, DW1 said that he considered the value at RM55,000 to be reasonable. But when he was asked on the amount of loan he obtained subsequently, DW1 was evasive in his answer. He had to be shown the hire-purchase agreement dated 26 October 1989 (exh. P3) before agreeing that he obtained RM87,150 with the said vehicle valued at RM120,000.

To another question DW1 replied that he allowed the plaintiff to continue using the said vehicle even after the loan with Sabah Finance Bhd. had been fully repaid as they were friends. DW1 also admitted that he did not receive any payment from the plaintiff for a period of 15 months after the full payment of the loan. However, according to him it was the pending action of the Inland Revenue Department that prompted him to reclaim the said vehicle.

The plaintiff also queried the 1st defendant pertaining to the endorsement on the registration card of the said vehicle. It was stated therein that the said vehicle was in Sandakan in June 1989 when it was in fact in Kota Kinabalu. The 1st defendant explained that he bought the said vehicle to Sandakan after taking it back from the plaintiff. And he said that Sabah Finance Bhd. was informed. Later, in re-examination the 1st defendant relied on his ignorance of the procedure in explaining on the endorsement. Meanwhile he also said that he took the registration card from the Sabah Finance Bhd. But he could not remember when.

Finally, the 1st defendant admitted that he transferred the said vehicle to his wife on 23 October 1989. Thereafter he proceeded to arrange for a loan with him as the guarantor. The 1st defendant also came up with an explanation on why he did not sell outright the said vehicle. He said that it was easier to re-sell after he had obtained a loan on it.

In answer to questions from the court the 1st defendant said that he did not give any credit note for the set-off of RM20,000. And as for the day when he took the said vehicle from the plaintiff he said that it was not pre-arranged. He confirmed that there was no previous conversation regarding the taking of the said vehicle. Yet the plaintiff, according to the 1st defendant, returned two keys to him on that day.

(iii) Findings

It is obvious from the evidence adduced by both sides that the two versions are diametrically opposite. Hence, before dealing with the probability of either one, I should first consider the status of exh. P1 (Trust Deed). If it is accepted as having been duly signed by the 1st defendant then that should go a long way for the plaintiff.

(a) The Trust Deed (Exh. P1)

The plaintiff testified that it was signed by him and the 1st defendant. Each of them had a witness to their respective signatures. However, only the witness to the signature of the plaintiff was called (PW2). The witness to the alleged signature of the 1st defendant was not called. The reason given was that the plaintiff could not trace him.

Meanwhile, the 1st defendant denied ever signing on exh. P1. He claimed it was concocted. The plaintiff did not call any expert to express an opinion on the signature which was disowned by the 1st defendant. In fact the plaintiff only relied on his own evidence and that of PW2 in his attempt to establish the authenticity of the signature allegedly belonging to the 1st defendant.

Now, I would think that in order to prove his allegation on the signature the Plaintiff should do more than just asserting. After all the onus is upon him to prove his assertion. (Section 103, Evidence Act 1950). And although the Trust Deed had been admitted and marked as an exhibit, it was done so on the basis that it could not be considered as a hearsay document since the plaintiff and PW2 admitted their signatures to be on it. However, as to the alleged signature of the 1st defendant it was left open to be established. The marking of the Trust Deed as an exhibit should not therefore be taken as conclusive as regards the alleged signature of the 1st defendant. "A document does not become admissible in evidence merely because it has been handed to the adjudicating officer and marked as exhibit": per Shankar J (as he then was) in *Chong Khee Sang v. Pang Ah Chee* [1984] 1 MLJ 377.

Having therefore considered the evidence as a whole pertaining to the Trust Deed (exh. P1) I am inclined not to rely on it at all for the purpose of determining this case. I am not saying that exh. P1 was indeed a concocted document. But for the plaintiff to rely on it, he has to prove his assertion. I am not satisfied on the balance of probabilities that that has been done. There are too many uncertainties attached to exh. P1. For instance, although PW2 said that there were four of them in the room at the time of executing exh. P1, he did not witness the signature of the 1st defendant. According to him he left the room soon after witnessing the signature of the plaintiff. And there

was no evidence adduced indicating the sequence in the execution of the document. Hence, contrary to what PW2 has said in evidence, there is obviously a doubt if PW2 ever saw the 1st defendant putting down his signature on the Trust Deed. Moreover, PW2 could not even identify the 1st defendant in court. Not that he was expected to recognise him but at least he could have recalled, even vaguely, the face that he saw earlier. In this case PW2 opted not to remember at all. It would have been a different story if the 1st defendant admitted to be in the room on that day. In this case he denied. And that adds to the danger in relying upon the evidence of PW2 as regards the signature of the 1st defendant.

Another source of uncertainty is the manner in which the document was stamped. The plaintiff initially said that it was stamped soon after the execution. That should have been in 1986, the time when it was executed according to the plaintiff. However, when he was confronted with the actual date of stamping the plaintiff changed his story. He then claimed that it was only stamped upon the advice of his erstwhile solicitor. Such variation in my view blurred further the alleged signature of the 1st defendant.

Accordingly, I should therefore deny the plaintiff of any benefit he might have hoped in the Trust Deed (exh. P1) for the purpose of establishing his claim.

(b) Which Version More Credible?

Even without the Trust Deed (exh. P1) I do not think that ends the claim of the plaintiff, contrary to the submission of the learned counsel for the defendants. The plaintiff, in making his claim, did submit an alternative basis, namely, an agreement to be inferred. And in his evidence the plaintiff did mention of an arrangement with the 1st defendant. Thus, casting aside the Trust Deed (exh. P1) the other evidence as a whole should be considered in order to determine if indeed there was an agreement or an arrangement as alleged.

And having undertaken a careful analysis of the evidence and circumstances adduced I am inclined to think that the version of the plaintiff as regards an agreement or an arrangement with the 1st defendant is more probable than that of the 1st defendant plain assertion of a sale.

I came to such a finding on the facts, of which some were not disputed, and the circumstances as follows:

(i) The 1st Defendant testified that the plaintiff sold the said vehicle to him for RM55,000 which he considered a reasonable price. But in fact he made no payment. Instead a loan of RM35,000 was taken from Sabah Finance Bhd. which the plaintiff had to repay. As for the balance the 1st defendant said that it was set-off from the debts owing to his companies by the

plaintiff's company. However, no document was produced to support that assertion. And the two writ of summons tendered by the 1st defendant, namely, exh. D2 and exh. D4 did not make any deduction for or reference to the RM20,000.

Furthermore, it is in evidence that after the 1st defendant had taken the said vehicle from the plaintiff he arranged for it to be transferred to his wife (2nd defendant) who proceeded to secure a loan from MBF Finance Bhd. for the sum of at least RM70,000 after deducting the Terms Charges of RM17,150. This is indicated in exh. P3. The cash price given for the said vehicle was RM120,000. And that was on 26 October 1989. The alleged sale to the 1st defendant was in 1986. Surely, at that time the value of the said vehicle would have been even more. The fact that in effect the plaintiff paid an average of about RM2,000 per month in rent, if at all it was rented, should reflect the actual value of the said vehicle at that time. And there was no evidence that it was repaired or refurbished subsequently. To sell it at RM55,000 would demand a firmer reason than merely on the basis that the plaintiff was in urgent need of RM35,000. No doubt in his police report, exh. P2, the plaintiff gave the value of the said vehicle at RM50,000. But he was not queried on this point and in fact the plaintiff stated quite clearly that when making the report he was still in shock due to the sudden seizure of the said vehicle. Hence, I should not consider the figure given therein as a bar to any further consideration of its price at that time. It should also be noted that as between the plaintiff and MBF Finance Bhd. in term of affixing the value of the said vehicle, I should think the latter has an advantage, being in the business of giving loans for purchase of vehicles;

(ii) that it would require more than just saying that the said vehicle was considered rented to the plaintiff when the plaintiff was made responsible not only to pay the instalments of the loan taken from Sabah Finance Bhd. but also for the insurance, road tax and all other expenses in return for its use. And if indeed it was rented, there was no convincing explanation why the 1st defendant did not subsequently ask for any payment for a period of 15 months after the loan with Sabah Finance Bhd. had been fully repaid. He relied on the excuse of friendship with the plaintiff for acting as such. But his conduct generally did not indicate such a friendship. For instance, he admitted taking the registration card of the said vehicle from the Sabah Finance Bhd. As a friend surely it would have been only proper for him to tell the plaintiff beforehand who was paying or paid the instalments. Further, his attitude towards the Repossession Authority (exh. P5) did not reflect any friendship towards the plaintiff. In evidence he said that he saw the document. Yet, instead of informing

the plaintiff, if he was indeed a friend, he only told the officer of the Sabah Finance Bhd. that the plaintiff was responsible for paying the instalments. In fact, the attitude of the 1st defendant indicated that he did not bother what ever happened to the said vehicle. If he was also the *de facto* owner, it would have been reasonable to expect him to ensure that there was no repossession by at least requesting the plaintiff to pay up. He could have also given the plaintiff an ultimatum of losing the use unless he met the repayments diligently. Nothing of that sort came about;

(iii) the manner in which the said vehicle was taken from the plaintiff is also relevant. According to the plaintiff it was seized by a person unknown to him on 5 Occtober 1989. But the 1st defendant gave a friendly version, saying that the plaintiff voluntarily surrendered the said vehicle to him together with two keys on that day. Yet the 1st defendant also admitted that the meeting on that day was not pre-arranged. Thus, if that was the case, then there was no explanation as to why the plaintiff should be carrying two keys at that time. Meanwhile, there was no admission from the plaintiff that he was carrying two keys at that time. As such it is probable that the plaintiff did not have the additional key on that day. Furthermore, it would have been an obvious commission of an offence by the plaintiff for lodging a police report if indeed in the first place he voluntarily surrendered the said vehicle to the 1st defendant. I am aware that the delay in making the report was taken as a point against the plaintiff. However, as discussed earlier, the plaintiff said that he was in the state of shock after the sudden seizure. I do not regard his explanation as highly improbable or unreasonable. Hence, the delay should not cloud the other compelling reasons to the contrary.

The subsequent hasty action of the 1st defendant also went against him. Not only did he transfer the ownership of the said vehicle to his wife (2nd defendant) but also ensured that it was heavily encumbered when he had it tied down to a loan of RM87,150. If it was true that all were well with the plaintiff, then there was no necessity for the 1st defendant to act as he did.

Even the endorsement on the Registration Card (exh. P6) was not helpful to the version of the 1st defendant. Whilst it was not in dispute that the said vehicle only changed possession in October 1989 in Kota Kinabalu, exh. P6 showed that in June 1989 the 1st defendant had already claimed that it was in Sandakan. Obviously a plan was then in offing. As a friend, surely the 1st defendant should have informed the plaintiff of the position of exh. P6 at that time. But there was no evidence that he did.

Accordingly, I am satisfied on the balance of probabilities that the said vehicle was seized from the plaintiff;

(iv) that taking into account the following factors, namely,

(1) the value of the said vehicle when the loan with MBF Finance Bhd. was taken;

(2) the repayment of the loan with Sabah Finance Bhd. by the plaintiff; and

(3) the total claims of the 1st defendant in the two legal actions commenced against the plaintiff and his company;

the cumulative effect is that the 1st defendant would be unduly enriched if indeed his version is upheld; and

(v) The plaintiff in his evidence was coherent and consistent in his assertion that he did not sell the said vehicle to the 1st defendant. No doubt he had some discrepancies in his evidence. However, I do not think they are material in so far as his main assertion is concerned. But as for the 1st defendant he was evasive in answering some of the pertinent questions. For instance, under cross-examination, these were his answers:

Q: Did you not take a loan of RM35,000 in order to help the plaintiff out of his financial difficulties?

Ans: I did not take out any loan.

Q: That the plaintiff paid the instalment repayment?

Ans: I do not know.

Q: That the plaintiff paid you RM3,500 being commission for helping the plaintiff?

Ans: No such thing.

…

Q: That you told me, the plaintiff that I had to sell the car before the finance company can approve the loan.

Ans: Not like this. The car was sold to me by the plaintiff and the loan from the finance company taken by the plaintiff. Because the plaintiff was the former owner of the car before the transfer to me so the finance would automatically release the money to the former owner.

Q: Are you saying that the plaintiff went to the finance company directly and the plaintiff was given the loan directly?

Ans: I do not know how the finance gave the plaintiff the money.

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Q: How much was the loan you took through your wife from the bank?

Ans: I cannot remember. Long time ago. I am not sure if there is any document. I am not a person familiar with accounting.

Q: Did you get RM55,000 loan for the car.

Ans: I cannot answer as I cannot remember.

(Witness shown a document).

This is the document from the finance company related to the loan which I took through my wife.

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...

...

Q: Can you now tell the court the figures, ie, the loan you took.

Ans: If this exh. P3 stated RM87,150 to be the amount, and that must be it.

Q: Who gave the figure of RM120,000 being the cash price of the car in this exh. P3. Was it given by a licensed valuer?

Ans: I do not know anything about this exh. P3. I only accepted what the finance company gave to me.

Q: Do you agree the figure of RM120,000 was arrived at after examining the car?

Ans: How they valued the car I do not know. Furthermore at that time I was in need of money. So I have to accept it.

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Q: Were you asked by Sabah Finance to pay up when I was late in payment?

Ans: We had discussed and informed the finance officer that the plaintiff was responsible for the instalment payment. So the finance company would look for him for payment. The finance company did not ask payment from me.

(Witness shown a document).

I have seen this document in Sabah Finance office. It was shown to me by officer in charge. Then I explained to officer that the car was used by the plaintiff and the plaintiff was responsible for instalment payments.

...

...

...

DW1: The plaintiff paid the instalment to the bank. I do not know where the plaintiff paid the instalment.

And in re-examination, the 1st defendant also said these:

From 1986 to 1989 the car was in the possession of the plaintiff. I rented it to the plaintiff. He was using it. I arranged the loan with Sabah Finance and the money was given to the plaintiff. The full loan of RM35,000.

...

...

There was the endorsement in June 1989. But I am not familiar with this type of procedure.

I instructed the vehicle licencing officer to endorse this on the registration card. I think at that time I was thinking of taking the car back and to get a loan. In June 1989 I cannot remember if I took the car. When I made the request to endorse I cannot remember if I took the car.

The car was with me. I took it from Sabah Finance. The car belonged to me and surely I should know the period for the car to be rented to the plaintiff. I cannot remember when I took the card from Sabah Finance.

From the above responses of the 1st defendant it is quite clear that he tried to limit his admissions on some crucial issues as much as he could. But in so doing he contradicted himself thereby diluting whatever earlier assertions he had made. And accordingly I find it difficult to accept him as a truthful witness.

For the above reasons that the version of the plaintiff is preferred. And I am satisfied on the balance of probabilities that the plaintiff has established his version. Hence, it is my finding that there was no sale of the said vehicle as alleged by the 1st defendant. Rather, I find that there was an agreement or arrangement between the plaintiff and the 1st defendant in the way as described by the former.

My answers to Issue (1) is therefore in the negative while for Issue (2) it is in the affirmative. Hence, it follows that the 1st defendant is liable to the plaintiff.

As for the 2nd defendant the plaintiff is alleging bad faith on her part when the ownership of the said vehicle was transferred to her. In the alternative, the plaintiff averred that she knew or ought to have known that the 1st defendant was holding the said vehicle in trust for him.

However, from the evidence adduced there was nothing at all to indicate that any of the allegations against the 2nd defendant were true. In fact neither of the allegations was even suggested to the 1st defendant while being cross-examined by the plaintiff. No doubt the 2nd defendant is the wife of the 1st defendant but there is no allegation of conspiracy or connivance. And I do not think it is fair and reasonable to attribute any knowledge of the 1st defendant to the 2nd defendant without proof except that she is the wife.

(b) Issue 3

It was contended by the learned counsel for the defendants that even if the plaintiff has proved his case, there is no question of damages payable as he has not established any loss suffered.

With respect, I find that argument to be without any merit in view of the evidence adduced as a whole. Firstly, it cannot be said that there is no loss. The said vehicle is gone and that is the actual loss. And based on my finding on liability the loss is the direct result of the breach of the agreement or arrangement on the part of the 1st defendant. Secondly, it is incorrect to say that there is no evidence on the value of the actual loss. Exhibit P3 indicates the value in 1989. And there was no dispute coming from the 1st defendant on the truth or accuracy of the contents of exh. P3. Further, it could not be said that the cash price was inflated as the finance company would not have simply accepted any unjustified figure. Thirdly, as the plaintiff is only claiming a loss value of RM120,000 and as the said vehicle was given the cash price of RM120,000 even as at 26 October 1989 I do not think the claim is exorbitant. It should be noted that the agreement or arrangement between the plaintiff and the 1st defendant was arrived at in 1986. It would be quite safe

to assume that in 1986 the said vehicle was newer and should have fetched a higher value.

Accordingly, I am satisfied on the balance of probabilities that the plaintiff has established his loss and damage arising from the breach of the agreement or arrangement by the 1st defendant.

Conclusion

For the reasons hereinabove I therefore enter judgment for the plaintiff against the 1st defendant in the sum of RM120,000.

I also award interest at the rate of 8% per annum from the date of the writ of summons (19 December 1989) to the date of this judgment. I do so in the exercise of my discretion pursuant to s. 11 of the Civil Law Act 1956. There shall also be the usual statutory interest at the rate of 8% per annum from the date of this judgment until full settlement. And costs to the plaintiff to be taxed unless agreed as against the 1st defendant.

In view of the orders given above I refuse the alternative prayer (c) of the plaintiff.

Finally, since I find no liability against the 2nd defendant I should award her costs. However, in view of the nature of the claim of the plaintiff and that in fact the 2nd defendant came to be the owner of the said vehicle at that time, it was reasonable and proper to add her as a party to the action. Hence, any taxed costs due to the 2nd defendant should be paid directly to her by the 1st defendant.